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Supreme Court, U.S.
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No. 98-1494

NO. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1997

Wayne Jackson – PETITIONER
(Your Name)

VS.

Jeffrey Dye – RESPONDENT(S)

MOTION FOR LEAVE TO PROCEED *IN FORMA PAUPERIS*

The ~~petitioner~~ Respondent asks leave to file the attached ~~petition for writ of certiorari~~ Brief in Opposition without prepayment of costs and to proceed *in forma pauperis*.

[ ] ~~Petitioner~~ Respondent has previously been granted leave to proceed *in forma pauperis* in the following court(s):

_____

_____

[X] ~~Petitioner~~ Respondent has not previously been granted leave to proceed *in forma pauperis* in any other court in this matter.

~~Petitioner~~ Respondent's affidavit or declaration in support of this motion is attached hereto.

Jeffrey Dye-Q
(Signature)

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29 pp

AFFIDAVIT OR DECLARATION
IN SUPPORT OF MOTION FOR LEAVE TO PROCEED *IN FORMA PAUPERIS*

I, Jeffrey Dyer, am the ~~petitioner~~ Respondent in the above-entitled case. In support of my motion to proceed without being required to prepay fees, costs or give security therefor, I state that because of my poverty I am unable to pay the costs of this case or to give security therefor; and I believe I am entitled to redress.

I further swear that the responses I have made to the questions and instructions below relating to my ability to pay the cost of proceeding in this Court are true.

1. Are you presently employed? Yes ___ No X

a. If the answer is yes, state the amount of your salary or wages per month and give the name and address of your employer.

b. If the answer is no, state the date of your last employment and the amount of salary or wages per month which you received. CLERK AT MARQUETTE BRANCH PRISON MY WAGES WAS $36.00 A MONTH!

2. Have you received within the past twelve months any income from a business, profession or other form of self-employment, or in the form of rent payments, interest, dividends, or other sources? Yes ___ No X

a. If the answer is yes, describe each source of income and state the amount received from each during the past twelve months.

3. Do you own any cash or have a checking or savings account? Yes ___ No X

a. If the answer is yes, state the total value of the items owned.

4. Do you own any real estate, stocks, bonds, notes, automobiles, or other valuable property (excluding ordinary household furnishings and clothing) Yes ___ No X

a. If the answer is yes, describe the property and state its approximate value.

5. List the persons who are dependent upon you for support and state your relationship to those persons. RONNIE D. MC CONNAL (SON)

I declare under penalty of perjury that the foregoing is true and correct.
Executed on: APRIL 5th, 19 99

Jeffrey Dyer
(Signature)

No. 98-1494

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1997

Wayne Jackson – PETITIONER
(Your Name)

VS.

Gregory S. Turner – RESPONDENT(S)

MOTION FOR LEAVE TO PROCEED *IN FORMA PAUPERIS*

The ~~petitioner~~ asks leave to file the attached ~~petition for writ of certiorari~~ Brief in Opposition without prepayment of costs and to proceed *in forma pauperis*.

[ ] ~~Petitioner~~ Respondent has previously been granted leave to proceed *in forma pauperis* in the following court(s):

[X] ~~Petitioner~~ Respondent has not previously been granted leave to proceed *in forma pauperis* in any other court in this matter.

~~Petitioner~~ Respondent's affidavit or declaration in support of this motion is attached hereto.

Gregory S. Turner
(Signature)

AFFIDAVIT OR DECLARATION
IN SUPPORT OF MOTION FOR LEAVE TO PROCEED *IN FORMA PAUPERIS*

I, Gregory Turner, am the ~~petitioner~~ Respondent in the above-entitled case. In support of my motion to proceed without being required to prepay fees, costs or give security therefor, I state that because of my poverty I am unable to pay the costs of this case or to give security therefor; and I believe I am entitled to redress.

I further swear that the responses I have made to the questions and instructions below relating to my ability to pay the cost of proceeding in this Court are true.

1. Are you presently employed? Yes ___ No ✓
   a. If the answer is yes, state the amount of your salary or wages per month and give the name and address of your employer.

   b. If the answer is no, state the date of your last employment and the amount of salary or wages per month which you received.

2. Have you received within the past twelve months any income from a business, profession or other form of self-employment, or in the form of rent payments, interest, dividends, or other sources? Yes ___ No ✓

   a. If the answer is yes, describe each source of income and state the amount received from each during the past twelve months.

3. Do you own any cash or have a checking or savings account? Yes ___ No ✓

   a. If the answer is yes, state the total value of the items owned.

4. Do you own any real estate, stocks, bonds, notes, automobiles, or other valuable property (excluding ordinary household furnishings and clothing) Yes ___ No ✓

   a. If the answer is yes, describe the property and state its approximate value.

5. List the persons who are dependent upon you for support and state your relationship to those persons.

I declare under penalty of perjury that the foregoing is true and correct.
Executed on: APRIL 5, 1999.

Gregory S. Turner
(Signature)

No. 98-1494

In the Supreme Court of the United States
October Term, 1998

WAYNE JACKSON, DEPUTY WARDEN,

Petitioner,

-v-

JEFFREY DYE and GREGORY TURNER,

Respondents,

Brief In Opposition to
Petition For Writ of Certiorari
To The United States Court Of Appeals
For the Sixth Circuit

Daniel E. Manville
Daniel E. Manville, P.C.
Counsel for Respondents
212 E. Huron Street
Suite 200
Ann Arbor, Michigan 48104
(734) 741-1140
(734) 665-7363
e-mail: jugh@earthlink.net

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QUESTIONS PRESENTED FOR REVIEW BY PETITIONER

Does the attorney fees provision of the Prison Litigation Reform Act, PLRA § 803, 42 U.S.C. § 1997e(d), apply to fees for services in a case seeking damages which was pending on the effective date of the PLRA?

THE PETITIONER'S QUESTION SHOULD HAVE BEEN SUBDIVIDED TO INCLUDE THE BELOW QUESTIONS SINCE THE ISSUE OF RETROACTIVITY OF THE PLRA IS BEFORE THIS COURT IN THE CASE OF Hadix v. Johnson, 143 F.3d 246 (6th Cir. 1988), cert. granted Johnson v. Hadix, 119 S.Ct. 508 (1998). THESE QUESTIONS WERE PRESENTED TO THE SIXTH CIRCUIT WHICH REJECTED THEM.

Does the attorney fees provision of the Prison Litigation Reform Act, PLRA § 803, 42 U.S.C. § 1997e(d)(2), which requires up to 25% of the inmate's judgment to be applied to any fee award, is applicable in a case awarding damages which was pending on the effective date of the PLRA?

Did the district court abuse its discretion when it refused to award any portion of the inmate's damage award toward the attorney fees that were ultimately awarded?

Does the attorney fees provision of the Prison Litigation Reform Act, PLRA § 803, 42 U.S.C. § 1997e(d)(1)(A), which states that fees shall not be awarded except to the extent that the fee was directly and reasonably incurred in proving an actual violation of the plaintiff's rights, preclude an award of fees for litigating fees in the district court after a damage judgment has been obtained?

PARTIES TO THE PROCEEDING

Respondents do not dispute Petitioner's designation of parties.

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JURISDICTION

Respondents do not dispute this Court's jurisdiction to review the judgment pursuant to 28 U.S.C. §1254(1).

STATEMENT OF THE CASE

The Petitioner is claiming that this case raises questions regarding PLRA fee limitations identical to those raised in Johnson v Hadix, No. 98-262, which arguments were held this past month. This claim by the Petitioner is not entirely correct. It is true that the issue of retroactivity of the fee provision of the PLRA is the same in both cases. However, there are other issues in this case which are not part of the Hadix case. The petitioner's question presented to this Court should have been subdivided to include the below questions:

> Does the attorney fee provision of the Prison Litigation Reform Act, PLRA § 803, 42 U.S.C. § 1997e(d)(2), which requires up to 25% of the inmate's damage judgment to be applied to any fee award, apply in a case where damages was awarded after the effective date of the PLRA but the case was pending on the effective date of the PLRA?
>
> Did the district court abuse its discretion when it refused to award any portion of the inmates' damage award toward the attorney fees that were ultimately awarded?
>
> Does the attorney fees provision of the Prison Litigation Reform Act, PLRA § 803, 42 U.S.C. § 1997e(d)(1)(A), which states that fees shall not be awarded except to the extent that the fee was directly and reasonably incurred in proving an actual violation of the plaintiff's rights, preclude an award of fees for litigating fees after a damage judgment has been obtained?

Furthermore, it seems that the issue in Hadix involves whether the PLRA applies to hours billed only after the effective date of the Act and not to hours billed prior to the effective date of the Act. If this is true, this case is not similar to the Hadix

litigation as claimed by the Petitioner.

This case is brought pursuant to 42 U.S.C. § 1983. Respondents filed this lawsuit for damages in 1995, claiming that Petitioner had substantial knowledge of the existence of a serious risk of their being assaulted and failed to take reasonable steps to protect them from that risk in violation of the Eighth Amendment to the United States Constitution. At trial, Respondents proved that they not only informed the petitioner of this risk but that their mothers had also called the petitioner and informed him of such. Each of the respondents was ultimately assaulted by other inmates and received serious injuries. When the case was initially tried, it resulted in a hung jury. On a retrial, a second jury found liability but awarded no damages. The Petitioner moved for a judgment as a matter of law, while respondents moved for a new trial as to damages only. The district court granted respondents' motion for a new trial as to damages only and ordered that the damage portion for each respondent would be tried before separate juries. At these trials for damages, the district court refused to instruct the jury as to the issue of punitive damages.

The third and fourth juries awarded Respondent Turner $13,000 and Respondent Dye $5,000. The district court entered judgment on December 2, 1996. App. 12a. Counsel for Respondents then filed an

application for attorney fees and costs. Counsel Manville sought $36,000 in fees at an hourly rate of $150. Counsel Steinberg sought $6,250 in fees at an hourly rate of $125.00. App. 1a-6a. In addition, Counsel filed a supplemental brief seeking $13,555, as attorney fees for litigating the question of attorney fees. App. 1a, n.1.

The Prison Litigation Reform Act, Pub. L. No. 104-134, 110 Stat. 132-66 (1996) (PLRA), took effect on April 26, 1996. The PLRA was intended to stem the tide of frivolous prisoner suits and to curtail the overly intrusive involvement of federal courts in managing state prison systems pursuant to remedial orders and consent decrees. See Petitioner's Petition for Certiorari, at 4-5 and n. 2. The Legislative History of the PLRA does not demonstrate that it was enacted to impact negatively on meritorious lawsuits brought by prisoners but just on frivolous lawsuits.

This case was filed prior to the effective date of the PLRA but the jury verdicts were not obtained until post PLRA. Upon entry of the judgments, the prisoners then sought attorney fees for the hours spent prior to and after the effective date of the PLRA. The defendants alleged that the § 803(2) of the PLRA applied to all hours spent on this litigation. The defendant also sought to have the district court award 25% of the damages toward the fees awarded. Further, the defendant argued that plaintiffs were not

entitled to fees for litigating fees since these hours were not directly and reasonably incurred in proving an actual violation of plaintiff's rights. The district court held that the PLRA did not apply to cases pending when it was enacted. The court of appeals affirmed.

REASONS FOR DENYING THE WRIT

I. THE CIRCUIT COURT CORRECTLY HELD THAT SECTION 803(d) OF THE PLRA DOES NOT APPLY TO LIMIT ENTITLEMENT TO ATTORNEY FEES IN CASES PENDING ON THE DATE OF ITS ENACTMENT

A. The Statutory Language of The PLRA's Fee Provisions Do Not Clearly and Unambiguously Indicate Congressional Intent to Apply It's Limitations Retroactively

The first question to be asked in determining whether a statute applies to pending cases is whether Congress has expressly resolved, by clearly stating in unambiguous language, that the statutory provisions at issue apply to pending cases. Landgraf v. USI Film Products, 511 U.S. 244, 280, 114 S.Ct. 1483 (1994). This Court recently emphasized it's ruling in Landgraf v. USI Film Products, that in order to apply a statute retroactively there must be an "extraordinarily clear statement of Congressional intent" of retroactive application. Lindh v. Murphy, 521 U.S. 320, 117 S.Ct. 2059 (1997).[1]

The statutory language at issue in Lindh which directs that "an application for writ of habeas corpus shall not be granted," except as otherwise provided, was found not sufficiently clear to

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[1] Demonstrating the rigor with which this Court enforces it's "clear statement" rules, Lindh gave as an example of possible unambiguous intent the following language: "This Act shall apply to all proceedings pending on or commenced after the date of the enactment of the Act." Lindh, supra at 2064 n. 4, citing Landgraf v. USI Film Products, 511 U.S. 244, 260 (1994).

overcome the longstanding presumption against retroactive legislation.

The language at issue in §803 of the PLRA parallels the language at issue in Lindh, directing that: "fees shall not be awarded" except as otherwise provided, and similarly fails to meet the stringent requirement of an expression of Congressional intent to apply the Act to pending cases.[2]

Absent unequivocal language prescribing the temporal reach of the statute and in the face of clear language in another section of this statute (802(b)(1), the Sixth Circuit correctly ruled it should follow the holding in Hadix v. Johnson, 143 F.3d 246 (6th Cir. 1998), which held that the PLRA's fee provisions set forth in §803(d) are inapplicable to these fee petitions which included both work performed prior to and after the PLRA's enactment date.

B. Application Of The Canons Of Statutory Interpretation Which Must Be Applied Unless There Is Clear Evidence Of Retroactive Legislative Intent Mandate That The PLRA Fee Provisions Not Be Applied To Pending Cases

In Lindh, this Court was asked to decide whether certain provisions of the Anti-Terrorism and Effective Death Penalty Act of

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[2] The vast majority of district courts and the Second, Sixth, Seventh and Eighth Circuits have held that the statute's language does not evince a sufficiently clear intent to apply the fee limitations of the PLRA to pending cases. Blissett v. Casey, 147 F.3d 218 (2nd Cir. 1998); Hadix v. Johnson, 144 F.3d 925 (6th Cir. 1998); Cooper v. Casey, 97 F.3d 914 (7th Cir. 1996); Jensen v. Clarke, 94 F.3d 1191 (8th Cir. 1996).

1996 (hereinafter "AEDPA"), which amended the federal habeas statute applied to an application for habeas pending at the time the new statute was enacted.[3] The court held that because one Section of the AEDPA explicitly applied to pending cases and the other relevant section did not, this evidenced clear congressional intent that the latter section would not apply to pending cases. Lindh v. Murphy, 117 S.Ct at 2063.

A similar analysis applied to the PLRA requires the same conclusion. The attorney fee provisions of the PLRA, amending 42 U.S.C. §1997e, are found in §803 of the Act. This section is silent as to whether it should be applied retroactively to pending cases or prospectively to cases filed after the Act's passage. In stark contrast, §802 of the Act, which addresses "appropriate remedies" in prison conditions litigation explicitly provides that the section is to be applied to pending cases stating:

> Section 3626 of Title 18 United States Code as amended by this Section shall apply with respect to all prospective relief whether such relief was originally granted or approved before, on, or after the date of the enactment of this title.[4]

---

[3] The AEDPA consists of two chapters, one of which governs capital cases and explicitly provides that it "shall apply to cases pending on or after the date of enactment of this act." The other chapter - the one at issue in Lindh - governs non-capital cases and provides only that "[a]n application for a writ of habeas corpus...shall not be granted" except as provided. 28 U.S.C. Section 2254(d). Lindh, supra at 2063-2065.

[4] In Hadix, the Sixth Circuit detailed the legislative history of the PLRA noting that as it made it's way through the

This Court held that the nearly identical difference between two sections of the AEDPA indicated Congress' intent that the latter provision should be applied only to cases filed after enactment of AEDPA. Lindh, 117 S.Ct. at 2063. This Court found this "negative implication []" to be particularly pronounced because "the two chapters had already been joined together [in a single bill] and were being considered simultaneously when the language raising the implication was inserted," although they began life independently and in different houses of Congress. Id. at 2065.

As in Lindh, the negative inference in the PLRA's §803 is particularly strong because the PLRA's legislative history shows that sections 802 and 803 "had already been joined together and were considered simultaneously when the language raising the implication was inserted." Lindh, 117 S.Ct. at 2065.[5]

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legislative process the two sections were originally joined together with the attorney fee and other remedy provisions appearing together in a single section subject to an explicit statement of applicability to all pending cases. Thereafter the attorney fees provision was extracted from this section and transferred to a new section of the bill (Section 803) which did not contain a retroactivity provision. The statute retained this structure until it's final passage. Hadix, supra 143 at 253-55.

[5] The Lindh Court thereafter ruled that where there is no risk of retroactive effect, the Court need not apply the judicial default rules traditionally employed in the second step of this Court's analysis in Landgraf stating: "Although Landgrafs default rule would deny application when a retroactive effect would otherwise result, other construction rules may apply to remove even the possibility of retroactivity (as by rendering the statutory provision wholly inapplicable to a particular case), as

While noting distinctions between the PLRA and AEDPA the Hadix Court found that the "identical negative inference that was drawn in Lindh can be drawn when Sections 802 and 803 are compared." Supra at 143 F.3d at 254-55. The Congressional removal of the attorney fees provisions from the section which explicitly provided for its application to pending cases, to a section which did not so provide, evince Congressional intent that this provision is only to be applied prospectively, i.e., to prisoners' cases brought after the effective date of the Act.

C. Application Of The PLRA's Fee Provisions To The Present Cases Would Constitute An Impermissible Retroactive Application Of The Act And Constitute Manifest Injustice To The Plaintiffs

In light of the statutory language and the application of the canons of statutory construction, one need not resort to the application of "judicial default rules," even under this analysis the provisions of this Act should not be applied retroactively. Landgraf v. USI File Products, supra. The judicial default rules are guided by the presumption against retroactively applying laws to pending cases absent clear legislative intent:

Lindh argues the recognition of a negative implication would do here. In sum, if the application of a term would be retroactive as to Lindh, the term will not be applied, even if, in the absence of retroactive effect, we might find the term inapplicable; if it would be prospective, the particular degree of prospectivity intended in the Act will be identified in the normal course in order to determine whether the term does apply to Lindh. Lindh, 117 S.Ct. at 2063.

> [T]he presumption against retroactive legislation is deeply rooted in our jurisprudence and embodies a legal doctrine centuries older than our republic. Elementary considerations of fairness dictate that individuals should have an opportunity to know what the law is and to perform their conduct accordingly; settled expectations should not be lightly disrupted. Id. at 1497. (internal footnote omitted).

Where after analyzing the legislative history, Congressional intent regarding a statute's reach is still unclear a court's next task is to determine whether application of the statute to a case based on events that occurred before the statute's passage would have a retroactive effect.

> [F]amiliar considerations of fair notice, reasonable reliance, and settled expectations offer sound guidance. Id. at 1499-1500.

Landgraf describing circumstances that constitute impermissible retroactive effect, this Court noted that:

> [E]very statute, which takes away or impairs vested rights acquired under existing laws, or creates a new obligation, imposes a new duty, or attaches a new disability, in respect to transactions or considerations already past, must be deemed retroactive. Id. at 1505.[6]

---

[6] This language does not purport to define the outer limit of impermissible retroactivity. Rather, our opinion in Landraf, like that of Justice Story, merely described that any such effect constituted a sufficient, rather than a necessary, condition for invoking the presumption against retroactivity. Indeed, we recognized that the Court has used various formulations to describe the "functional conception of legislative 'retroactivity,' and made no suggestion that Justice Story's formulation was the exclusive definition of presumptively impermissible retroactive legislation." Hughes Aircraft Co. v. United ex rel. Shumes, 520 U.S. 939, 117 S.Ct. 1871, 1876 (1997).

Application of the PLRA's attorney fee provisions to this case would have an impermissible retroactive effect that would result in manifest injustice to the Plaintiffs. Such application would deny Plaintiffs' counsel "fair notices" that counsel, who are all private practitioners undertook, this litigation with the settled expectation that they would be compensated for the hours that were reasonably spent litigating the case at the prevailing market rate for attorneys with similar experience and skill.

If the attorney fee provisions of the PLRA are applied to this case, Plaintiffs' counsel would be compensated well below market rates for hours reasonably spent in successfully obtaining a monetary judgment for each of the plaintiffs. The reduction brought by the PLRA's restrictions would attach new legal consequences to events completed before the PLRA's enactment -- the assumption of this representation for these Plaintiffs at the expense of handling other litigation -- and take-away rights acquired under then-existing laws.[7] The relevant event for

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[7] As recognized by the court in Jensen v. Clarke, 94 F.3d 1191 (8th Cir. 1996): "Nothing in this portion of the Act expressly prescribes its reach. The Act was not in effect when the plaintiffs' attorneys accepted this appointment, when liability and fee determinations were made [.] ... When the plaintiffs' attorneys were exerting what the District Court quite fairly described as "herculean" efforts on their behalf, they expected to have their fee determined under Section 1988. If we apply the Act, those expectations will be foiled. Thus, application of the Act is this case would have the retroactive effect of disappointing reasonable reliance on prior law. That leaves us with the "traditional presumption" against retroactive application...It would be "manifestly unjust" to upset

measuring expectations of attorney fees is not, as Defendants argue the date counsel performed work but rather the date counsel agreed to take the case. It is at that time that Plaintiffs and their counsel, relying upon the law providing for compensation at prevailing market rates should Plaintiffs prevail that counsel evaluates the case, the likelihood of success and the expectations of reimbursement at a reasonable rate should they prevail. It is at this time that Plaintiffs' counsel committed themselves ethically to representation of these prisoners to ensure that the Constitution is honored.[8]

Given these considerations, and given the fact that Plaintiffs and Plaintiffs' counsel did not have "fair notice" that their fees would be radically cut during the course of the litigation, the provisions would have "retroactive effect" if applied to the present cases.[9]

[plaintiffs'] reasonable expectations and impose new guidelines at this late date."

[8] The Ninth Circuit panel in Madrid v. Gomez concurred in finding that the relevant date for measuring expectations is "the moment when counsel agreed to take the case." 150 F.3d at 1039. The court, however, concludes that expections of recovery at that time were too uncertain, failing to recognize that balancing the uncertainty with a reliance upon the knowledge that if one does prevail, compensation will be at a fair market rate is the basis upon which an evaluation is made prior to deciding whether to take a case.

[9] The settled expectation is for compensation at the prevailing market rate, whatever that may be, not to any specific pre-determined hourly amount.

II. ANY CONFLICT BETWEEN THE REASONING OF THE CIRCUITS ON THIS ISSUE HAS BEEN RESOLVED BY THIS COURT'S SUBSEQUENT OPINIONS

Defendants urge review of the Sixth Circuit's opinion to resolve a conflict among the circuits. The differences in the reasonings of the circuit opinions which have addressed the retroactive application of the PLRA's fee provisions do not warrant a grant of certiorari in this case.

Defendants argue that the Sixth Circuit's opinion stands alone in opposition to three circuit decisions holding that the PLRA's fee limitations apply to cases pending on the date of its enactment. Defendants' Petition pp. 8-9 referencing Alexander S. v. Boyd, 113 F.3d 1373 (4th Cir. 1997), cert. denied, 139 L. Ed. 2d 869 (1918); Madrid v. Gomez, 150 F.3d 1030 (9th Cir. 1998), reh'g pet. filed and Williams v. Brimeyer, 122 F.3d 1093 (8th Cir. 1997).

Defendants however fail to advise this Court that the Williams holding, issued as a two-page order, was rejected by a subsequent decision of the Eighth Circuit holding that the PLRA's fee provisions do not apply to pending cases, Weaver v. Clarke, 120 F.3d 852 (8th Cir. 1997), cert. denied, 118 S.Ct. 898 (1998) (relying upon Jensen v. Clarke, 94 F.3d 1191 (8th Cir. 1996)) and that Alexander S. was decided prior to and without the benefit of and is inconsistent with this Court's treatment of the retroactivity issue in Lindh v. Murphy, supra.

The only circuit decision which was issued after Lindh is the

Ninth Circuit's opinion in Madrid. However as plaintiffs have requested a rehearing, asserting that the panel's holding in Madrid conflicts with the retroactivity analysis of a prior en banc decision of the circuit in Jeffries v. Wood, 114 F.3d 1484 (9th Cir. 1997), and the court had ordered briefing on these issues, the final outcome of this decision remains uncertain.

The only final circuit decisions issued after Lindh that address the PLRA's applicability to post-enactment attorney fees is the Sixth Circuit case in Hadix v. Johnson, supra, and the Second Circuit's opinion in Blissett v. Casey, 147 F.3d 218 (2nd Cir. 1998). These decisions properly apply Lindh's rulings to the attorney fee provisions of the PLRA in holding that the fee provisions do not apply retroactively to limit Plaintiffs' attorney fees in pending cases.

There is also no conflict on the questions of whether the Act's limitations apply retroactively to limit attorney fees for services performed prior to the effective date of the Act and "awarded" subsequent to the Act's passage.[10] The statutory language of the Act makes no distinction between services performed prior to the Act's effectiveness as opposed to services performed after its passage.

The courts, both at the circuit and district level, have been

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[10] This case involves the applicability of the Act to both pre and post-passage fees for litigating an Eighth Amendment claim for damages.

nearly uniform in holding that Section 803(d) does not apply to "awards" of attorney fees for services performed prior to the passage of the Act. The opinions are based on a consistent finding that the statutory language does not evince a clear intent as to its temporal reach.[11] Utilizing the statutory analysis prescribed in Landgraf, courts have proceeded with a judicial default inquiry and ruled that application of the Act to pre-passage services would constitute an impermissible retroactive application. Cooper v. Casey, 97 F.3d 914 (7th Cir. 1996); Jensen v. Clarke, 94 F.3d 1191 (8th Cir. 1996);[12] Glover v. Johnson, 138 F.3d 229, 249 (6th Cir. 1998).[13]

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[11] The one dissention from this analysis was Alexander S. v. Boyd, 113 F.3d 1373 (4th Cir. 1997), cert. den'd, 118 S.Ct. 880 (1998). A divided panel ruled that the PLRA restrictions applied to work performed both before and after the effective date of the Act offering different rationales for this decision. Alexander S. v. Boyd, 113 F.3d at 1385-1386, 1388, 1392-1393 as noted.

[12] The rationale of Jensen is not limited to pre-enactment fees. The Eighth Circuit subsequently relied on Jensen to affirm awards of §1988 attorney fees that were made after the effective date of the PLRA, holding that Jensen rejected retroactive application of the PLRA's fee provision. See Weaver v. Clarke, 120 F.3d 852, 853 (8th Cir. 1997), cert. denied, 118 S.Ct. 898 (1998).

[13] In addition, nearly every district court which has considered the question has also found the PLRA's attorney fee provision inapplicable to pre-passage work. Blissett v. Casey, 969 F. Supp. 118 (N.D.N.Y. 1997) (refusing to apply restrictions to attorneys fees earned after PLRA went into effect when case was pending on effective date); Hadix v. Johnson, 965 F. Supp. 996 (W.D. Mich. 1997) (same). There are also a number of unreported district court opinions refusing to apply the PLRA fees restrictions in cases that were pending when the Act became

In light of the uniformity in decisions and this Court's recent decisions on statutory retroactivity, a grant of certiorari in not warranted in this case.

All of the circuit courts decisions on the issue of whether the PLRA applies to limit attorney fees for post-enactment services began their analysis by determining whether the statutory language itself evinced a sufficient, clear and unambiguous Congressional intent to apply this statute retroactively sufficient to overcome the presumption against such retroactive application of statutes. Each circuit court found that the statutory language itself was ambiguous and did not clearly specify the temporal reach of the statute.[14] Courts then diverged in their analysis of the retroactive applicability under judicial default rules. The different conclusions reached by these cases are the result of some of these cases being decided prior to this Court's ruling in Lindh or apparently without consulting this opinion.

The Sixth Circuit correctly rejected the distinction between pre and post enactment fees under the PLRA as such a distinction

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effective. Tragale v. Scheel, No. CV-N-93-672-DWH (D. Nev. May 21, 1997); Browning v. Vernon, No. Civ. 91-0409-5 BLW (D. Idaho March 7, 1997); Coleman v. Wilson, No. CIV 5-90-0520 LKK JFM (E.D. Cal. Jan 21, 1997); Perrier v. City of Albuquerque, No. Civ. 95-943 RLP/WWD (D.N.M. Dec. 17, 1996); Miller-Bey v. Stiller, No. 93-CV-72111, 1997, U.S. Dist. LEXIS 8524 (E.D. Mich. Feb. 25, 1997).

[14] The principle opinions in Alexander opined that "nothing in § 803 of the PLRA expressly prescribes it's reach."

would require an interpretation of the same statutory language to convey Congressional intent to apply § 803 to pending cases for post-enactment fees but not apply it to pending cases for pre-enactment fees. Accordingly, the court said:

> We do not believe the statutory language is capable of such a sophisticated construction; either the fee provision applies to pending cases or not. Hadix, supra 143 F.3d at 252.

Both the Second Circuit in Blissett and the Sixth Circuit in Hadix, who have analyzed the statute subsequent to this Court's ruling in Lindh, proceeded after determining that the statutory language was not clear enough to overcome the presumption of retroactivity and then applied the canons of statutory construction mandated by this Court in Lindh. There exists no conflict for the court to resolve where the only final circuit decisions, Blissett and Hadix, which analyzed the statute's provisions pursuant to this Court's rulings in Lindh and Hughes, are both consistent and correctly apply this Court's rulings.

CONCLUSION

The Sixth Circuit Court of Appeals correctly held that the attorney fee provisions of the PLRA are inapplicable to these cases which were pending and in which judgments were rendered prior to the effective date of the Act.

RELIEF SOUGHT

WHEREFORE, Plaintiffs-Respondents respectfully request that this Court deny the Petition for Writ of Certiorari or if it is granted that the sub-issues listed be included.

Respectfully submitted,

Daniel E. Manville
(Counsel of Record)

200 E. Huron St., Ste. 200
Ann Arbor, MI 48104
(734) 741-1140

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